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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIC LADENHEIM MD, Inc.,

Cross-complainant and Appellant,

v.

MEDSTREAMING, LLC et al.,

Cross-defendants and Respondents.

G055331

(Super. Ct. No. 30-2017-00901210)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Randall J. Sherman, Judge. Affirmed.

Yarra Law Group and H. Ty Kharazi for Cross-complainant and Appellant.

Affeld Grivakes and Damion D. D. Robinson for Cross-defendant and Respondent Medstreaming, LLC.

No appearance for Cross-defendant and Respondent Balboa Capital Corporation.

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California-based Balboa Capital Corporation (Balboa) <sup>1</sup> sued California-based Eric Ladenheim MD, Inc. (Ladenheim, Inc.) and Eric Ladenheim (collectively Ladenheim) for defaulting on a commercial financing agreement. Ladenheim, Inc. used financing from Balboa to purchase software from Washington-based Medstreaming, LLC (Medstreaming). When Balboa sued Ladenheim in California, Ladenheim, Inc. only filed a cross-complaint adding Medstreaming to the action.

Medstreaming moved to dismiss or stay the cross-action based on its contract with Ladenheim, Inc., which contained a forum selection clause (motion). The forum selection clause provided: “The state and federal courts of King County, Washington will have exclusive jurisdiction over any disputes under [the parties’] License Agreement.” Ladenheim, Inc., the sole cross-complainant,<sup>2</sup> contends the trial court erred by granting Medstreaming’s motion because enforcement of the parties’ forum selection clause was unreasonable. Medstreaming counters the court correctly determined the forum selection clause was valid and enforceable. We agree with Medstreaming and affirm the court’s order.

## **FACTS**

Medstreaming is a software company located in Redmond, Washington. It develops medical imaging software, which it licenses across the country and internationally. Ladenheim operates a medical center in Fresno, California. In 2015, Ladenheim, Inc. contracted with Medstreaming to license software for its medical practice (agreement). Medstreaming completed all of the software development and customization from its Washington office with assistance of an overseas affiliate. None

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<sup>1</sup> Balboa did not file a respondent’s brief on appeal.

<sup>2</sup> Eric Ladenheim is not a named party to the cross-complaint.

of the work took place in California. The agreement contemplated Medstreaming would provide all of the ongoing technical support, software updates, consulting, and backend support remotely from Washington or through the overseas affiliate. Again, none of these services took place in California.

The agreement contained the following choice-of-law and forum selection clause: “This [a]greement shall be governed by and construed and enforced in accordance with the laws of the State of Washington, excluding its principles of conflicts of law. The state and federal courts of King County, Washington will have exclusive jurisdiction over any disputes under this [a]greement.”

Ladenheim, Inc. financed the software through Balboa. Eric Ladenheim personally guaranteed the indebtedness. Medstreaming is not a party to the financing contracts.<sup>3</sup> Ladenheim’s contracts with Balboa also contained a forum selection clause, providing for litigation of any disputes arising out of those contracts in Orange County, California. When Ladenheim defaulted on the loan with Balboa, Balboa sued Ladenheim in the Superior Court of Orange County in February 2017. Ladenheim, Inc. filed a cross-complaint against Balboa that same month, also adding Medstreaming as a cross-defendant. Among other things, Ladenheim, Inc. alleged Medstreaming breached the agreement and “violated its contractual duties” because “the devices did not work as promised.” Ladenheim, Inc. also sued Medstreaming for fraud and indemnity.

After being served, Medstreaming moved to dismiss or stay Ladenheim, Inc.’s claims against it, seeking to enforce the forum selection clause. Ladenheim, Inc. opposed the motion, but did not submit any declarations or other supporting evidence. Ladenheim, Inc. argued that the forum selection clause was “unreasonable” because

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<sup>3</sup> Ladenheim, Inc.’s characterization of the parties’ contracts as a “three-party contract” is inaccurate. Ladenheim, Inc. signed separate contracts with two distinct parties requiring litigation in separate forums.

Balboa had filed suit in California, and it would have to file a separate lawsuit against Medstreaming in Washington.

The trial court granted the motion, staying Ladenheim, Inc.’s cross-complaint as against Medstreaming. It ruled in pertinent part: the agreement contains a mandatory forum selection clause and the “clause is valid, enforceable, and is not unreasonable” because “[t]here is no reason to believe that Ladenheim would not receive a fair trial in Washington State or could not exercise all of his rights and remedies in that state.”

### **DISCUSSION**

Ladenheim, Inc. contends the trial court erred by granting Medstreaming’s motion because the parties’ mandatory forum selection clause was unreasonable. We disagree.

A mandatory forum selection clause, like the one included in the agreement at issue, is “generally given effect unless enforcement would be unreasonable or unfair.” (*Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 147 (*Verdugo*)). “[T]he general factors [relevant to a forum non conveniens motion which is not based on a contractual forum selection clause] are pertinent only in the *absence* of a contractual provision, since under those circumstances neither party possesses a right to any particular forum and the selection of one over the other requires the weighing of a gamut of factors of public and private convenience, not to mention the strong interest of a plaintiff’s domicile in providing the plaintiff access to its courts. However, a party which has contracted away its right to choose its home forum (as well as all the concomitant conveniences of a home forum) has presumably done so because the value it receives from the negotiated deal is worth the chance the party may be required to litigate disputes elsewhere. To apply the general factors in this context would in essence be rewriting the bargain struck between the parties, which might not have been consummated in the

absence of the forum selection clause.” (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1683 (*Cal-State*).)

The party seeking to avoid application of the forum selection clause bears a “substantial burden” to prove unreasonableness. (*CQL Original Products, Inc. v. National Hockey League Players’ Assn.* (1995) 39 Cal.App.4th 1347, 1354.)

Inconvenience or expense is not the test for unreasonableness for a mandatory forum selection clause. (*Ibid.*) “A clause is reasonable if it has a logical connection with at least one of the parties or their transaction.” (*Verdugo, supra*, 237 Cal.App.4th at p. 147.) Courts refuse to enforce a forum selection clause where a forum is “‘unavailable or unable to accomplish substantial justice,’” where the selected forum has no “rational basis in light of the facts underlying the transaction” (*Cal-State, supra*, 12 Cal.App.4th at p. 1679), or where enforcement would be contrary to public policy. (*Id.* at p. 1680.)

We review the trial court’s decision under the abuse of discretion standard of review. (*Verdugo, supra*, 237 Cal.App.4th at p. 148.)<sup>4</sup> “[F]orum selection clauses are valid and may be given effect, in the court’s discretion and in the absence of a showing that enforcement of such a clause would be unreasonable.” (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496 (*Smith*).)

Here, there is no dispute the forum selection clause at issue is mandatory. It states, in clear terms, “[t]his [a]greement shall be governed by and construed and enforced in accordance with the laws of the State of Washington, excluding its principles of conflicts of law. The state and federal courts of King County, Washington will have exclusive jurisdiction over any disputes under this [a]greement.” Ladenheim, Inc. does not argue the underlying agreement was unenforceable.

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<sup>4</sup> We note the minority view applies the substantial evidence standard. (*Cal-State, supra*, 12 Cal.App.4th at pp. 1680-1681.)

Ladenheim, Inc.’s appeal is based on the premise enforcement of the forum selection clause would be unreasonable. Ladenheim, Inc. effectively asks us to decline to enforce a mandatory forum selection clause simply because there is related litigation pending in California. There is no precedent for such an outcome.

Ladenheim, Inc.’s argument fails for two reasons. First, it depends entirely on factors that courts have consistently deemed irrelevant to the enforcement of a forum selection clause. Second, Ladenheim, Inc. presented no evidence to the trial court to show unreasonableness and, thus, failed to carry its burden of proof.

“[A] motion based on a forum selection clause is a special type of forum non conveniens motion. The factors that apply generally to a forum non conveniens motion do not control.” (*Berg v. MTC Electronic Techs.* (1998) 61 Cal.App.4th 349, 358.) Ladenheim, Inc. bases its entire argument on traditional forum-non-conveniens factors, which do not govern here. Ladenheim, Inc. argues the forum selection clause is unreasonable due to the risk of inconsistent rulings, and inconvenience of litigating in Washington. Courts have repeatedly held that, while these factors apply in the absence of a forum selection clause, they are irrelevant where the parties contractually agree to a specific forum. (*Cal-State, supra*, 12 Cal.App.4th at p. 1682-1683.) “To apply the general factors in this context would in essence be rewriting the bargain struck between the parties.” (*Id.* at p. 1683.) Thus, “avoidance of multiplicity of suits and conflicting adjudications” (*id.* at p. 1682) is “pertinent only in the *absence* of a contractual provision.” (*Id.* at p. 1683.) Furthermore, “[m]ere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things.” (*Smith, supra*, 17 Cal.3d at p. 496.)

The case *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490 (*Lu*) is instructive. There, plaintiff franchisees sued their franchisor for rescission and damages. (*Id.* at p. 1492.) The underlying franchise agreement contained the following forum selection clause: “[a]ny and all litigation that may arise as a result of

this Agreement shall be litigated in Dade County, Florida.’” (*Ibid.*) The trial court granted the franchisees’ motion to dismiss the action in California based upon the forum selection clause, and the Court of Appeal affirmed. (*Id.* at pp. 1492-1493.) The franchisees argued enforcement of the forum selection clause was unreasonable because there was an insufficient connection between them and the chosen forum of Florida. (*Id.* at p. 1493.) In support, franchisees submitted a declaration asserting they both resided in California, neither had visited Florida in connection with the business, and the parties negotiated the agreement in California. (*Ibid.*) The Court of Appeal observed franchisees were “in essence arguing that enforcement of the forum selection clause would be unreasonable because it would be inconvenient for them to litigate in the chosen forum of Florida,” but explained “[t]his argument has been flatly rejected by the California Supreme Court, which has held “[m]ere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things.’”” (*Ibid.*)

As in *Lu*, the parties here had a binding, mandatory forum selection clause. While litigating that the underlying dispute in Washington could cause Ladenheim, Inc. inconvenience or additional expense, those considerations are irrelevant when considering whether a mandatory forum selection clause is reasonable. Indeed, in its reply brief Ladenheim, Inc. concedes “mere inconvenience and expense is not enough to find unreasonableness.”

Furthermore, even if extreme inconvenience could be sufficient to invalidate a forum selection clause where it amounted to effective unavailability, Ladenheim, Inc. offered no evidence to support this argument. The burden of proof on a motion to enforce a forum selection clause is squarely on the party seeking to invalidate it. (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 198.) Since Ladenheim, Inc. presented no evidence of inconvenience to the trial court, the court

properly determined it failed to carry the heavy burden of showing a lack of effective recourse in Washington.

**DISPOSITION**

The order is affirmed. Medstreaming is entitled to its costs on appeal.

GOETHALS, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.